Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

LI YU,
Administrator of Deceased Wei Wu's Estate
Petitioner,

v.

RICK PERRY,
In his official capacity only
As the Governor of State of Texas;
DARLENE BYRNE,
Individually and in her official capacity
As Texas State Court Judge;
GREG ABBOTT, In his official capacity
As Texas Attorney General
JOHN CORNYN,
In his individual capacity
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a default judgment due to the respondent-defendant's willful failure to appear by the due date is a matter of law or a matter of the district court's discretion when a petitioner is entitled to relief?

2. Whether Texas Health And Safety Code §693 for removal of human organs, tissues, and body parts from a deceased without necessarily obtaining consent have violated the Fourth, Fifth, and Fourteenth Constitutional Amendments, and caused the damages to the Petitioner?

3. Whether "Texas Unauthorized Practice of Law" statutes have deprived the Petitioner of her constitutional right for freedom of speech on behalf of her decedent and minor survivor, and violated the First and Fourteenth Constitutional Amendments?

4. Whether the Petitioner has a constitutional right to jury trial of this case, pursuant to the Seventh Amendment to the Constitution of the United States?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner-plaintiff, Li Yu ("Yu"), requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit did not select its opinion for publication. The judgment was entered December 17, 2003 affirming the district court's orders of April 23, 2003 and May 20, 2002 (Appendix: Exhibit A, page a-c).

The district court's rulings of April 23, 2003 and May 20, 2002 from the bench are reprinted in the appendix respectively at Exhibit B, page d-j, and Exhibit C, page k-q.

The petitioner Yu preserved her rights to jury trial of this case in her original complaint pursuant to the Seventh Amendment to the United States Constitutional but the district court never allowed the case to reach the jury.

JURISDICTION

The Fifth Circuit entered its final judgment December 17, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

Pursuant to Rule 13 of the U. S. Supreme Court, this petition is timely filed within 90 days after entry of the judgment of the Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Constitution:

Amendment I

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Amendment XIV

No State shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of Title 28, Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure 1

These rules govern the procedure in the United States district courts in all suits of civil nature... They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Federal Rules of Civil Procedure 5(a)

No service need be made on parties in default for failure to appear.

Federal Rules of Civil Procedure 12(a)(1)(A)

(a). When Presented. (1) Unless a different time is presented in a statute of the United States, a defendant shall serve an answer (A) **within 20 days** after being served with the summons and complaint.

Federal Rules of Civil Procedure 55

(a). **Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b). **Judgment**. Judgment by default may be entered as follows:

(1). **By the Clerk**. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the

amount due shall enter judgment for that amount and cost against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2). **By the Court**. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein ...

COURT SUMMONS AT ISSUE

The Court-Issued Summons to Texas Governor Rick Perry

"YOU ARE HEREBY SUMMONED and required to serve upon" plaintiff Li Yu "an answer to the complaint which is herewith served upon you, **within (20) twenty days** after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service."

STATEMENT OF FACTS

This is the ninth appeal regarding Dr. Wei Wu's ("Dr. Wu") wrongful death and Texas governmental wrongdoing. When Dr. Wu passed away in 1999, the petitioner Yu was appointed the administrator of Dr. Wu's estate. Thereafter,

Yu has fought for the service of justice from the state court to federal court. Both courts denied equal justice under law and the right of her peacefully to petition the Government for a redress of grievances. Yu's grievances came from her decedent's wrongful death, State governmental theft of cornea from her decedent, denial of equal protection and due process of laws for deceased and minor, and discrimination against her for not being a lawyer, etc.

In December of 2000, Yu, on behalf of Dr. Wu's estate and his minor survivor, attempted to file two lawsuits with the State of Texas court regarding Dr. Wu's wrongful death. One was against Dr. Wu's former medical surgeon, Dr. Neely, who has been on drugs, and been sued several times for his medical malpractice since 1999, and is now on three years probation[1]. Another lawsuit was against Dr. Wu's former employer, Texas Department of Transportation, under the Americans with Disabilities Act of 1990. At the time of filing the case, Yu was imposed to pay more fees than lawyers do. Then the defendant, John Cornyn ("Cornyn"), the former Texas Attorney General, and now the U. S. Senator, as a lead counsel for defendants, initiated a process of enforcing "Texas Unauthorized Practice of Law" statutes to abate and dismiss Yu's cases simply because Yu was not a lawyer. The defendant, Darlene Byrne ("Byrne"), a state court judge, disregarding a fact that the deceased and minor could not represent themselves in Court, not only refused to appoint counsel for them but also disallowed Yu to represent them in suit. Upon Cornyn's initiation, Byrne labeled Yu's legal representation of her people as unauthorized practice of law, alleging that Yu could not fully represent her people, so Byrne abated and dismissed Yu's lawsuits with prejudice.

After dismissing her state court lawsuits, Yu filed this case with the federal court challenging six Texas statutes as

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[1] See www.keyetv.com, KEYE Investigates: Dr. Neely 1/19/04.

unconstitutional that affected her constitutional rights and caused her grievances. These six Texas statutes are Texas Health and Safety Code §693, Texas Government Codes §§81.101 and 81.102, Texas Penal Codes §38.122 and §38.123, and Texas Local Government Code §86.021.

Texas Health and Safety Code §693 allows the State to remove cornea, body parts and tissues from a deceased without necessarily obtaining consent. Accordingly, a Texas medical examiner removed Dr. Wu's cornea and possible other organs without the knowledge of his family member and legal representative in November 1999.

Texas Government Codes §§81.101 and 81.102, and Texas Penal Codes §38.122 and §38.123 were called "Texas Unauthorized Practice of Law" statutes. While those state laws fail to equally protect a deceased, and minor who can not possibly self represent in Court, they negatively deny all non-lawyers to speak for another in Court. If a non-lawyer were suspected of practice of law, he/she would be most likely fined, punished, or prosecuted with a crime/felony. The maximum punishment can be up to 10 years in prison and $10,000.00 fine. Yu's state court lawsuits were dismissed because of those unconstitutional statutes.

After filing the case with the federal court, Yu procedurally served the original Complaint and Summons of this case to Texas Governor Rick Perry ("Perry") March 22, 2002. But Perry did not appear to answer the Complaint until after Yu filed a motion for default judgment seeking relief of $2,315,930 May 1, 2002. According to the Court-issued Summons and Federal Rules 12(a)(1)(A), 5, and 55, this willful negligence rendered that Yu automatically won the case by default. District Judge Sam Sparks ("Sparks"), however, determined neither to comply with the federal rules and Summons to enter default judgment nor resolve this case in a just, speedy and inexpensive manner. On the one side,

Sparks denied the jurisdiction over this case, so he refused to enter default judgment against Texas May 20, 2002. On the other side, he contradictorily admitted that the district court had subject matter jurisdiction over this case, so he withheld Cornyn in his official capacity[2] in this case to continue the so-called discovery.

In settlement, Yu attempted to use the $2,000,000 that she was entitled for relief in default judgment to negotiate with new Texas attorney general Greg Abbott ("Abbott") in exchange for his office providing free legal advice to the public. Abbott refused to negotiate this settlement.

Even though the State of Texas made its laws to challenge the First, Fourth, Fifth, and Fourteenth Amendments, and enforced them to cause damages to Yu, Sparks still created a theory that the dismissed defendants did not have enforcement authority over Texas laws. Yu filed a motion to recuse Sparks due to his prejudicial conduct, but Sparks refused to recuse himself from this case. Until March of 2003 in the status conference, Sparks still believed that only the Texas attorney general enforced Texas laws and Governor Perry didn't. Thus Sparks disallowed Yu to depose Perry to obtain case related information, but compelled Yu to show up in a deposition that Abbott requested. While Sparks threatened Yu for dismissal of this case if Yu did not appear in the deposition, he promised to put the case in trial with a jury of seven if Yu appeared in the deposition. So Yu attended the deposition and did not depose Perry or anyone else. Nevertheless, Sparks' first theory did not last long! Due to Abbott refusing to disclose any information in discovery, Yu filed a motion to compel Abbott for disclosure. Sparks basically denied the motion. After Yu filed all required documents with the Court for jury trial including Statement of Contentions, Voir Dire Questions, Proposed Jury

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[2] Greg Abbott replaced Cornyn in his official capacity later.

Instruction, Proposed Verdict Form, Exhibit List, Witness List, and Motion in Limine, Sparks suddenly canceled the docket call of April 25, 2003 two days previous. At this time he came up the second theory purporting that Texas attorney general, Texas chief law enforcement officer, did not have power to enforce Texas laws either, and Cornyn and Byrne were doing their jobs when they enforced Texas statutes dismissing Yu's state court lawsuits. Despite Abbott's summary judgment without any admissible evidence or affidavit in support, Sparks still granted his motion dismissing him from this case April 23, 2003. Wherefore, the district court delayed one year to dismiss this entire case, but it in fact failed to provide a level ground for Yu to discover the case and deprived Yu of her right for jury trial.

On December 17, 2003, the Court of Appeals for the Fifth Circuit affirmed the district court's orders of May 20, 2002 and April 23, 2003. Neither the Fifth Circuit nor District Court made a sound recommendation as to who may have enforcement authority over Texas statutes without immunity and be responsible to cause Yu's grievances. The Fifth Circuit even commented that the default judgment was the discretion of the district court rather than a matter of right that Yu was entitled. By this judgment, all court summons and federal rules for default judgment became a piece of dough to be molded and served in favor of the political prerogative. People's civil rights and equal protection of laws have been deeply buried in the judge's hands. The judgment from lower courts has so far departed from the accepted and usual course of judicial proceedings. Many plaintiffs have during the past won the default judgment without a problem once a defendant failed to appear by the due date. Texas government has not been, but should have been, responsible for making its unconstitutional laws that caused damages to Yu and her people. The lower courts' failure to uphold **Equal Justice under Law** gave rise to this appeal.

REASONS FOR GRANTING THE WRIT

It is imperative to grant a writ of certiorari in order to ensure meaningful and uniform enforcement of constitutional guarantees to all citizens under **Equal Justice under Law**.

1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO DEFAULT JUDGMENT IS A MATTER OF LAW OR A MATTER OF DISTRICT COURT'S DISCRETION.

Like other federal laws, Title 28, the Federal Rules of Civil Procedure were made for a reason. The reason is to be fair with all parties in civil litigation. The scope of these Federal Rules is to "govern the procedure in the United States district courts in all suits of civil nature" (Rule 1).

Judgment by default is one of these Federal Rules in order to "secure a just, speedy, and inexpensive determination". The default judgment due to failure to appear by the due date has been systematically set up in the federal court. Fed. R. Civ. P. 12(a)(1)(A) and Summons both emphasize the time frame for a defendant to respond to the complaint to be 20 days from the date the defendant receives the Complaint and Summons. Once a defendant fails to appear by the due date, the defendant is in default and loses all legal rights to proceed with the case according to Fed. R. Civ. P. 5. Judgment by default shall be accordingly entered as plaintiff wins the case, which is thoroughly warranted in Fed. R. Civ. P. 55.

In this case, the court issued summons to Perry March 12, 2002, stated clearly that failure to answer the complaint by the due date would render a default judgment against him. The essential content of summons hereby representing the court sent a message to Perry that he must meet the deadline to answer the complaint, or he would lose the case by default. Perry was the Governor of Texas and competent enough to represent the State in this suit. Though Perry alleged in Court that he received Yu's motion for default judgment and did not

receive the complaint and summons, his allegations were not supported with the uncontested evidence. First, Perry filed an answer against the complaint 41 days after the service. If he did not have Yu's complaint in hand, how could Perry know that the original complaint contained 126 paragraphs that he answered with one to one paragraph correspondences? Second, Yu used the same approach to serve the complaint and motion to the same published address of Perry and had evidence in hand to prove both adequate services. How could Perry receive the motion and not receive the complaint? Obviously, the internal problem within the governor's office, if any, was not Yu's fault. Third, Perry should have filed a motion under Fed. R. Civ. P. 12(b)(4) for insufficiency of process service if he had not received the complaint and summons but he failed to do so. The only logical explanation was that Perry indeed received the Complaint and Summons March 22, 2002, but negligently failed to answer it by April 11, 2002. Even though Yu adduced considerable evidence demonstrating the necessity of default judgment, Sparks neither held a hearing nor allowed Yu to depose Perry to find the truth behind his allegations. Instead, Sparks abused his discretion not to enter default judgment in favor of laws but to dismiss the defendants from the case.

None of the above facts are disputed. At issue, however, is how important the Federal Rules are in civil litigation. One case concluded that these rules have statutory effect. *U.S. for Use of Tanos v. St. Paul Mercury Ins. Co.*, C.A.Fla. 1966, 361 F.2d 838, certiorari denied 87 S.Ct. 510, 385 U.S. 971, 17 L.Ed2d 435. Another case required Court and litigants must follow these rules in the same manner as they must obey a statute. *Beasley v. U.S.*, D.C.S.C. 1948, 81 F.Supp. 518. Inasmuch as a judge is not above the law, the judge does not have discretion to disobey laws and federal rules in order to prejudice a party. The denial of default judgment due to failure to appear by the due date rarely happened in the usual course of judicial proceedings.

The U. S. Court of Appeals for the D.C. in one case held: "once a defendant fails to file a responsive answer, he is in default, and entry of default may be made by either the clerk or judge". *Kackson v. Beech*, 1980, 636 F.2d 831, 205 U.S.App.D.C. 84.

U. S. Court of Appeals for the 11th Circuit held: "default judgment can be entered by clerk of court when a party is in default for failure to appear". *Arango v. Guzman Travel Advisors*, C.A.11 (Fla.) 1985, 761 F.2d 1527, certiorari denied 106 S.Ct. 408, 474 U.S. 995, 88 L.Ed.2d 359.

By definition there can be no inconsistency between the default judgment and pleadings inasmuch as default necessarily has effect of admitting all well-pleaded facts in a complaint relating to liability. *In re Uranium Antitrust Litigation*, D.C.Ill.1979, 473 F.Supp. 382, remanded on other grounds 617 F.2d 1248. General rule is that, upon default, factual allegations of the complaint, except those relating to amount of damages, will be taken as true. *Geddes v. United Financial Group*, C.A.Or. 1977, 559 F.2d 557.

Even if the State may have immunity to shield a frivolous suit under the Eleventh Amendment, no federal law allows the State to be immune from default judgment. Default judgment is unassailable on the merits so far as it is supported by well-pleaded allegations that are assumed to be true. *Nishimatsu Const. Co., Ltd. V. Houston Nat. Bank, C.A.Tex.* 1975, 515 F.2d 1200. Therefore, the district court should have considered Yu's complaints as true and accordingly entered default judgment. The Defendant, being technically in default for failure to file answer, could not press motion to dissolve preliminary injunction. *I.C.C. v. Smith, D.C.Pa.* 1949, 82 F.Supp. 39. To this extent, Texas lost all legal rights in this suit including the right to assert immunity and filing further pleadings due to Perry's failure to appear by the due date according to Fed. R. Civ. P. 5.

This suit is not near the verge of frivolity. The Fourteenth Amendment to the U. S. Constitution states "**No State shall make OR enforce any law which shall abridge the privilege or immunity of citizens of the United States**". The "OR" hereby means that once a state makes a law with an attempt to abridge the privilege or immunity of U. S. citizens, the district court shall have jurisdiction to proceed a case. The State of Texas not only made but also enforced its unconstitutional statutes to steal cornea from Dr. Wu, and punish Yu for freedom of speech in Court, which directly violates the Fourteenth Amendment. In light of the Fourteenth Amendment, the federal power is allowed to intrude upon the province of the Eleventh Amendment and, therefore, to abrogate states' Eleventh Amendment immunity from suit. *Seminole Tribe of Florida v. Florida*, U.S.Fla. 1996, 116 S.Ct. 1114, 517 U.S. 44, 134 L.Ed.2d 252.

Both the Fifth Circuit and District Court did not judge whether the challenged Texas statutes were unconstitutional, but ruled that the defendants did not have enforcement authority over Texas laws. According to them, defendants Cornyn and Byrne were doing their job when they enforced Texas statutes to dismiss Yu's state court lawsuits and Perry had nothing to do with this enforcement. This logic was childish because Texas government made those challenged Texas laws legal in Texas. In the process of making a legislative bill legal in Texas, the governor has to sign the legislative bill into Texas law. From this point of view, Texas governor participated in making the challenged Texas laws and Texas government should be responsible for the unconstitutionality of Texas statutes. If Texas government had not made them legal in Texas, Cornyn and Byrne would not have had a legal ground to dismiss Yu's state court lawsuits, and the Texas medical examiner would not have removed Dr. Wu's cornea secretly. To this end, the district court had jurisdiction over this case to enter default judgment against Texas due to Perry's failure to appear by the due date.

2. THIS COURT SHOULD RESOLVE THE DISAGREEMENT BETWEEN TEXAS AND CONGRESS - AS TO WHETHER TEXAS HEALTH AND SAFETY CODE §693 VIOLATES THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS.

A writ of certiorari should be granted because the Fifth Circuit has decided an important federal question of Constitution regarding harvest of cornea, organs and body parts from deceased that has not been, but should be, settled by this Court. The ruling in this matter from lower courts also affects those tourists who may accidentally die in Texas.

Texas Health and Safety Code §693 allows a medical examiner to remove cornea, body parts, and tissues from deceased if the medical examiner cannot locate the deceased's spouse, parents, adult children, brothers, or sisters within four hours. If a deceased only leaves a minor behind, the medical examiner does not have to even wait for four hours to harvest organs and dismember the deceased. Thus in Texas a deceased's civil rights cease when he/she perishes, and a child does not have an equal protection of the parents' property from theft. Such as Texas refused to prosecute a thief who stole $4000 from Dr. Wu's estate and a Texas bank refused to recover or compensate the stolen money.

The Fifth Amendment to the U. S. Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation". Equal Protection of private property and human right does not allow the State of Texas to remove Dr. Wu's cornea for public use without consent and just compensation.

The Fourth Amendment emphasizes: "the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated". The cruel action done by the State of Texas amounted to inhuman seizures of body parts of Dr. Wu.

The Fourteenth Amendment: " No State shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws". As Texas made its law to authorize the medical examiner to remove the cornea without necessary consent and indeed removed Dr. Wu's cornea without knowledge of his survivor and legal representative, the State violated this Amendment. Thus, from this point of view, the State does not have immunity at all.

Children are entitled equal protection of their parents' body parts from theft by the State. Even though a deceased may not have a relative or legal representative, the State should be prohibited from removing any tissue from the deceased because taking an advantage of deceased are unambiguously condemned and publicly recognized as disgusting and criminal and controversial with human rights, civilization, morality, and equal protection.

Without Texas Health and Safety Code §693, stealing cornea from a deceased, like stealing money from a deceased, would be within the meaning of crime. Since the Governor signed the legislative bill into the Texas law and made it legal in Texas with providing immunity to the medical examiner, the State should be responsible for such unauthorized removal of cornea from Dr. Wu. Pursuant to the Fourth, Fifth, and Fourteenth amendments, Yu has constitutional right to request the due process of law and demand the State of Texas for just compensation of its wrongdoing. While donation of human organs and tissues may benefit the society, the donation itself is a personal matter and the consent must be obtained.

3. THIS COURT SHOULD RESOLVE THE DISAGREEMENT BETWEEN TEXAS AND CONGRESS - AS TO WHETHER "TEXAS UNAUTHORIZED PRACTICE OF LAW" STATUTES VIOLATE THE FREEDOM OF SPEECH IN THE FIRST AND FOURTEENTH CONSTITUTIONAL AMENDMENTS.

The tension between lawyers and non-lawyers has existed for a long time. Lawyers make law to control the Court demanding other professionals to make the best efforts to serve the public. Lawyers, however, take less responsibility to benefit the society. Engineers usually provide free technical instruction, warranty, and follow-up service with their engineering products such as computers, cars, TV, etc. to serve the public. Lawyers, however, set up the court legal system in this country, but seal off the legal instruction of the system to the general public, let alone the warranty and follow-up service. Middle class people including engineers, scientists, professors, etc. often feel puzzled what to do in Court due to lack of legal instruction after paying the filing fees to the Court in addition to paying tax to maintain the operation of Court. When people go to law firms for legal assistance, we are asked to pay high attorney fees. In Texas the attorney fees are driven up to $200 per hour or more while an average person only earns $10-$40 per hour prior to taxes. The high attorney fees do not necessarily warrant the satisfactory service. Lawyers, unlike engineers, do not refund attorney fees for losing the case. The great difference between attorney fees and non-lawyer's income prompts many non-lawyers to seek legal assistance from other knowledgeable non-lawyers with low or no cost.

"Texas Unauthorized Practice of Law" statutes is comprised of Texas Government Codes §§81.101 and 81.102, and Texas Penal Codes §38.122 and §38.123. They were made with an attempt to set up a "Lawyer Zone" to prohibit non-lawyers from providing legal assistance to another.

Texas Penal Code §38.122 states:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country.....

Yu never claimed to anyone that she was a lawyer, but repeatedly clarified that she was not a lawyer, and she brought the lawsuits in order to fulfill her obligation to protect the best interest of estate and paid all legal costs from her own pocket. Despite Yu's contention, Byrne actively participated in the enforcement of "Texas Unauthorized Practice of Law" dismissing Yu's lawsuits upon Cornyn's misrepresentation of a case law misstating that an estate was an entity that must be represented by lawyer.

Texas Penal Code §38.123 further details the "Lawyer Zone" as follows:

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person:

(1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

The undefined quantity of economic benefit gives lawyers discretion to crack down on innocent people. Hundreds of non-lawyers are investigated and harassed for stepping into this "lawyer zone" by the Texas Unauthorized Practice of Law Committee every year. While holding oneself out as a lawyer in order to charge high attorney fees is fraud, the legal activities describing in Texas Penal Code §38.123 do not involve in any violence, fraud, theft, and drugs to injure another. As this "lawyer zone" harasses many innocent people, it is too extensive to protect the public interest.

There is an inherent conflict between Texas penal code §38.122 and §38.123 and other Texas laws. Texas CP & R §71.004 manifestly authorizes the administrator to bring or defend a lawsuit on behalf of the estate, but Texas State Court dismissed Yu's such lawsuits. In addition, Texas Probate Codes §241(a) authorized Yu to receive an administrative fee, 5% of amount of receiving for or payment from the estate account. Texas Penal Codes §38.122 and §38.123, however, neither exclude administrator from practice of law term, nor rule the administrative fee out of the economic benefit, which threatens Yu in performing her official duty. This fear of punishment will not be removed until these two statutes are expunged or modified. In fact, the Texas "lawyer zone" does not truly deter profiteers from private gain, such as a vendor who was supported by a lawyer attempted to sell Dr. Wu's medical records to Yu in her state court lawsuit.

What is "practice of law"? The "practice of law" in Texas is defined in code §81.101(a) as follows:

"In this chapter the "practice of law" means the preparation of a pleading or other document incident

> to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument..."

Literally reading this Texas statute, a child who writes a will for the parents and is a beneficiary of the will is guilty of practice of law. If a child cannot even assist the parents in legal matters, lawyers have invaded people's life too deeply. Freedom of speech and press is the indispensable condition of nearly every other form of freedom. *Curtis Pub. Co. v. Butts, Ga. & Tex.*1967, 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094, opinion conformed to 418 S.W.2d 379, rehearing denied 88 S.Ct. 11, 13, 389 U.S. 889, 19 L.Ed.2d 197, 198, certiorari denied 88 S.Ct. 2036,391 U.S. 966, 20 L.Ed.2d 880.

Because of this "lawyer zone", Texas probate court disallowed Yu to directly submit the estate annual report. The estate must pay a lawyer to do this simple work. Yu and the estate lawyer both have worked for Dr. Wu's estate for four years. During the past, Yu managed the estate and calculated the updated account balance, and the lawyer was to fill in numbers on the annual report based on Yu's data and then filed with Court. For this simple work, the estate lawyer charged $175 per hour. According to the estate lawyer, by May 2003 his attorney fee was up to $4485.10, but Yu's administrative work on the estate was only worth $72.33.

The current legal system allows a self-represented person, *pro se*, to perform legal work without a lawyer, which suggested that legal work is not too difficult to be learned and handled, otherwise, the Court should have barred *pro se* too. If a lay person whose professional salary is only $10-40 per hour can handle legal work without problem, the attorney

fees of $200 per hour is ridiculously high. Inasmuch as most legal documents are duplicated after a minor change of the case number, name, style, etc., the legal work is only worth $20 per hour or so. Yu is a licensed engineer, and has handled her civil cases without a lawyer. In comparison of technique of legal work with that of engineering, the legal work has nothing really difficult. What the *pro se* litigants cannot overcome is the barrage of some judge's strong bias and prejudice against them.

The deceased, minor, and incompetent people are in the most miserable situation, and do not even have *pro se* right in Court. If they lack of money to make lawyers happy, lawyers will abandon them and kick them out of the Court to cry for justice without hesitation. Typically, Texas lawyers have abandoned Yu's decedent and minor survivor for the service of justice whereas Texas government in the light of day stole Dr. Wu's cornea for public use without compensation. If Yu had not proffered service for the estate filing two lawsuits with Texas State Court, it would not even have had a record to indicate that Dr. Wu was in fact mistreated by his employer and medical doctors and forced to end his life.

The First Amendment authorizes that people have freedom of speech as well as the right to peacefully assemble, and to petition the Government for a redress of grievances. This amendment occupies the preferred position among the various guarantees of liberty. *People v. Duryea*, 1974, 351 N.Y.S.2d 978, 76 Misc.2d 948, affirmed 354 N.Y.S.2d 129, 44 A.D.2d 963. The freedoms given by this amendment are protected by Amendment 14 from invasion by the states. *Edwards v. South Carolina*, S.C.1963, 83 S.Ct. 680, 372 U.S. 229, 9 L.Ed.2d 697.

The Fourteenth Amendment prohibits a state from making or enforcing any state law that abridges the privilege or immunity of citizens of the United States, and from

denying to any person within its jurisdiction the equal protection of the laws. Under this amendment and due process clause of Amendment 14, freedom of press, freedom of speech and freedom of religion are in a preferred position. *Follett v. Town of McCormick*, S.C.1944, 64 S.Ct. 717, 321 U.S. 573, 88 L.Ed. 938. As a citizen of the United States, Yu has a privilege for freedom of speech regarding her decedent's wrongful death and has immunity against punishment for such free speech. Yu's legal representation of her decedent and minor survivor in lawsuit is to "peacefully petition the Government for a redress of grievances". It was unconstitutional that Texas abridged Yu of such rights.

As a matter of fact, lawyer's refusal to provide free legal advice and service to the general public causes the activities of "unauthorized practice of law". These activities often occur among middle class people who are neither poor enough to receive free legal aid, nor rich enough to pay lawyers for legal advice and service. These activities, in fact, are to remedy the deficiency of our legal system. Teaching and learning the knowledge of law in order to handle legal matters correctly and assisting another in legal matters is not criminal but civilization. This civilization promotes diverse competition for justice and assists every lawyer-abandoned person to approach equal justice under law. Punishing a non-lawyer citizen who neither claims to the public to be a lawyer nor charges a high attorney fee to be a felon is not justifiable. Between good faith assistance and criminal is a big gap that can't be easily jumped from white to black.

Yu has fought for the service of justice from the state court to the federal court. That both courts dismissed Yu's cases did not mean that Yu lacked the knowledge of law to fully represent her people. It only suggested that the current legal system had a serious problem impeding the service of justice. Typically, lawyers intend to bully *pro se* Yu and lie and cheat in order to win the case. None of Courts ever had

confidence to let Yu's cases reach the jury. The judges dismissed Yu's cases and appeals not based on laws, rather, at their discretion. The judges themselves failed to provide a level ground for Yu to proceed with the case. No matter how well Yu complied with laws, rules and court orders, fully paid all fees, and made good faith effort for cooperation, Sparks and defending attorneys still played various games to prevent Yu's case from reaching the jury.

Boiling down the Texas "lawyer zone", it has profound defects and is not tenable to protect the public interest, instead, it promotes lawyers to monopolize the court for excessive private gain. In terms of discrimination, this "Lawyer Zone" is much like the "White Zone" of the fifties, deeming all non-lawyers as inferior citizens with less or no constitutional right for freedom of speech in legal matters, and inciting less than 1% of the population, lawyers, to discriminate against 99% of people. The Texas "lawyer zone" was set up with an attempt to isolate non-lawyer citizens from receiving legal assistance that they can afford and impede the service of justice. It is legitimate to infer that lawyers refuse to provide free legal advice to the general public because they want to drive up their attorney fees. The "lawyer zone" is a means for lawyers to utilize legal power to bully non-lawyers, and grab money from people in the name of the practice of law and this robbery is legal in Texas.

4. THIS COURT SHOULD RESOLVE THE DISAGREEMENT BETWEEN THE DISTRICT COURT AND CONGRESS - AS TO WHETHER THE SEVENTH AMENDMENT FOR THE RIGHT OF JURY TRIAL SHOULD BE REMAINED IN THE U. S. CONSTITUTION

Aside from the issue of default judgment, Yu has a constitutional right for jury trial of this whole case as well. Plaintiff's right to a jury trial in federal court is determined as

a matter of federal law. *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 610-11, 9 L.Ed.2d 691 (1962). Civil litigants, like criminal defendants, have constitutionally protected right to complete consideration of their case by impartial panel of jurors. *Hasson v. Ford Motor Co.*, 1982, 650 P.2d 1171, 32 C.3d 388, 185 Cal.Rptr. 654, certiorari dismissed 103 S.Ct. 1167, 459 U.S. 1190, 75 L.Ed.2d 422.

The Seventh Amendment provides that, "... in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Guaranty of jury trial under this amendment applies with its full force to trial conducted in the federal district court in Puerto Rico. *Mitsui & Co.(U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, D.C. Puerto Rico 1983, 558 F.Supp. 116. Neither Congress nor courts may deprive litigant of right to jury trial guaranteed by this amendment. *Raytheon Mfg. Co. v. Radio Corporation of America*, C.C.A.Miss.1935, 76 F.2d 943, affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327. See, also. *Berning v. Louisville & N.R. Co.*, 1938, 92 F.2d 997.

The right to a jury trial for this case was preserved in the original complaint. Dismissing this case without jury trial violates the Seventh Amendment. So long as a legal cause of action is implicated and legal relief is authorized, the fundamental promise in the federal system is that a timely demand for a jury will be preserved. *Thermo-Stitch, Inc. v. Chemi-Chord Processing Corp.*, 294 F.2d 486, 491 (1961). The Seventh Amendment requires that when a legal remedy is available a timely jury demand be honored. *Reiner v. State of N.J.*, 732 F. Supp. 530 (1990).

The function of a district judge is to assure the due process of law and administer the service of justice. Whether defendants were guilty or not for violation of Yu's constitutional rights was a jury matter that would be

determined at trial. Sparks should not have determined such because of the Seventh amendment. Yu's First, Fourth, Fifth, Seventh, and Fourteenth amendment rights have preponderance over the defendants' immunity. Federal district court cannot predetermine facts for jury. *Garcia v. Murphy Pac. Marine Salvaging Co.*, C.A.La. 1973, 476 F.2d 303. Under this amendment's guaranty of trial by jury, it is for jury to weigh evidence and pass upon its credibility. *Snead v. New York Cent. R. Co.*, C.A.W.Va. 1954, 216 F.2d 169. To this end, the district court was erred and abused its discretion when it denied the entrance of default judgment and subsequently dismissed the entire case shortly prior to the jury trial. If people preserve the right for jury trial but in reality the court refuses to give people such right, the Seventh Amendment should not be remained in the U. S. Constitution.

CONCLUSION

For the reasons set forth above, Petitioner Li Yu respectfully prays that this honorable Court grant a writ of *certiorari* to review the judgment from the lower courts in this case, set appeal for briefing, judge the constitutionality of alleged Texas statutes, and reverse the decision of the Fifth Circuit.

Respectfully Submitted,

Li Yu

Li Yu
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(785) 233 – 0237

Dated : March 6, 2004

APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

("FILED" Seal)
(Dec. 17, 2003)

No. 03-50502
Summary Calendar

LI YU, Administrator of Deceased Wei Wu's Estate,
Plaintiff – Appellant,

v.

RICK PERRY, in his official capacity only as the Governor of State of Texas; DARLENE BYRNE, Individually and in her official capacity as Judge of Texas Court; GREG ABBOTT, Texas Attorney General, in his official capacity as Texas Attorney General; JOHN CORNYN, in his individual capacity,

Defendants – Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-02-CV-157-SS

Before BARKSDALE, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Li Yu appeals the district court's dismissal of her civil rights complaint alleging that certain Texas statutes were unconstitutional and that the named defendants violated various constitutional rights.

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[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Yu sued Governor Rick Perry in the name of the state of Texas and in his official capacity. To the extent that Yu's complaint is against the State of Texas itself, the state is immune from suit under the 11th Amendment. See Employees v. Missouri Public Health & Welfare Department, 411 U.S. 279, 280 (1973). To the extent Yu seeks damages from Perry in his official capacity, he is immune from such claims. See Hafer v. Melo, 502 U.S. 21, 27 (1991).

Yu also seeks prospective injunctive relief preventing the enforcement of the allegedly unconstitutional statutes; however, because she has not shown that either Governor Perry or Attorney General Abbott has a "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty," the district court properly dismissed her official capacity claims against both officials. See Okpalobi v. Foster, 244 F.3d 405, 416 (5th Cir. 2001) (en banc).

Yu also argues that the district court erred in not granting a default judgment against Governor Perry. The entry of a default judgment is committed to the discretion of the district court; a party is not entitled to a default judgment as a matter of right even when the defendant is technically in default. See Ganther v. Ingle, 75 F.3d 207, 212 (5th Cir. 1996); Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977). Even if a party fails to answer the complaint, the district court cannot enter a default judgment if it lacks subject matter jurisdiction. See United States v. Texas Tech Univ., 171 F.3d 279, 285 n.9, 288 (5th Cir. 1999) (Eleventh Amendment immunity deprives court of subject matter jurisdiction); Forsythe v. Saudi Arabian Airlines, 885 F.2d 285, 288 n.6 (5th Cir. 1989) ("a party cannot waive subject matter jurisdiction by its silence."). As discussed above, because the district court properly dismissed Yu's claims against Governor Perry, it did not abuse its discretion by refusing to enter a default judgment.

Yu's claims against Judge Byrne were also properly dismissed. Judicial officers are entitled to absolute immunity from claims arising out of acts performed in the exercise of their judicial functions. Mays v. Sudderth, 97 F.3d 107, 110-11 (5th Cir. 1996). Judicial immunity may be overcome only by showing that the actions complained of were nonjudicial in nature or were taken in the complete absence of all jurisdiction. Mireless v. Waco, 502 U.S. 9, 11-12 (1991). Yu has not shown that Judge Byrne lacked jurisdiction or that her actions were nonjudicial in nature.

Yu's claims against former Texas Attorney General John Cornyn in his individual capacity also were properly dismissed. Yu has not shown that Cornyn had any personal involvement other than his role as Attorney General; however, a supervisor may not be held liable for a civil rights violation under a theory of respondeat superior or vicarious liability. See Stewart v. Murphy, 174 F.3d 530, 536 (5th Cir. 1999).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LI YU, Administrator of the Estate of Wei Wu, Deceased

Plaintiff,

"FILED"
Seal

-Vs-

Case No. A02-CA-157-SS

RICK PERRY, in His Official Capacity Only as the Governor of State of Texas; DARLENE BYRNE, Individually and in Her Official Capacity as a Judge of Texas Court; and JOHN CORNYN, individually and in His Official Capacity as Texas Attorney General,

Defendants.

ORDER

BE IT REMEMBERED on the 23rd day of April 2003 the Court reviewed the file in the above-styled cause, specifically Defendant's Motion for Summary Judgment [#39] and the Plaintiff's opposition thereto [#41]. Having considered the motion, response, case file as a whole and the applicable law, the Court enters the following opinion and order.

Background

The plaintiff, Li Yu, a kansas resident, filed this civil rights lawsuit pursuant to 42 U.S.C. §§1983, 1985, and 1988. She alleges the defendants violated her constitutional rights in connection with two lawsuits she brought in Travis County district court concerning the death of Wei Wu, of whose estate she was appointed administrator. She contends the defendants conspired to violate and did violate her rights to bring *pro se* lawsuits, protected by the First, Fourth and Fifteenth Amendments to the United States

Constitution. Yu challenges the constitutionality of Texas Health and Safety Code §693, which involves the removal of a deceased's cornea and organ by the medical examiner; Texas Government Code §§81.101 and 81.102 and Texas Penal Code §38.122 and 38.123, which relate to the unauthorized practice of law by non-lawyers; and texas Local Government Code §86.021, which requires litigants to pay a service fee for service of legal documents by a constable. *See* Plaintiff's Pleading on the Constitutionality of Six Texas Statutes [#37]. Yu seeks declaratory relief that these state statutes are unconstitutional; injunctive relief preventing the enforcement of such statutes and reinstating her state court cases; and monetary damages.

In December 2000, Yu filed a medical malpractice and defamation lawsuit on behalf of Wu's estate and his minor survivor in the 261st District Court of Travis County, Case No. GN003531, and another suit on behalf of Wu's estate against the State of Texas Department of Transportation ("TXDOT") and two TXDOT employees in the 345th District Court of Travis County, case No. GN003532. *See* Byrne's Motion to Dismiss [#2], Ex. A. The state attorney general's office, representing TXDOT, moved to abate Case No. GN003532 because an estate is an entity that cannot proceed *pro se*. *See* Plaintiff's Response to Cornyn's Motion [#12], Ex.A. Judge Darlene Byrne, presiding over the case in accordance with the rotating docket, granted the motion. On October 4, 2001, a different district judge dismissed the case.[2] Case No. Gn003531 was dismissed on December 12, 2001. This Lawsuit grew out of those lawsuits.

On May 20, 2002, the Court dismissed Defendants Darlene Byrne and Rick perry and granted partial summary judgment to Defendant John Cornyn on Plaintiff's claims against him in his individual capacity. Thereafter the only remaining claims were Yu's claims against Defendant Cornyn in his official capacity. Yu

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[2] As the plaintiff notes, "On October 31, 2001, plaintiff filed an almost odentical complaint against the TxDOT defendants with Federal Court after the state court dismissed the case GN003532." Complaint, at ¶72. This Court dismissed that case, Case No. A-01-CA-741-SS, on September 16, 2002. The Fifth Circuit affirmed the dismissal on April 18, 2003.

filed an interlocutory appeal, which the Fifth Corcuit dismissed for lack of jurisdiction on August 20, 2002. When Greg Abbott became the Attorney General of texas, he replaced John Cornyn in his official capacity pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure. Abbott now moves for summary judgment.

Analysis

Defendant Abbott moves for summary judgment on all of Plaintiff's claims against him in his official capacity. Summary judgment may be granted if the moving party shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party-here, the plaintiff. *Hart v. O.Brien,* 127 F.3d 424, 435 (5th Cir. 1997), *cert denied,* 119 S. Ct. 868 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler,*909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of producing evidence in the summary judgment process. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548 (1986). First, "[t]he moving party must show that, if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof." *Hart,* 127 F.3d at 435. The nonmoving party must then "set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings." *Id.* However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996).

Abbott moves for summary judgment on Yu's claims for damages based on Eleventh Amendment immunity and on Yu's claims for declaratory and injunctive relief on the basis that he has no enforcement power over the allegedly unconstitutional statutes and therefore is the improper defendant in this lawsuit. Under the Eleventh Amendment, federal courts lack subject matter

jurisdiction over suits by a citizen of a state against another state, absent the state's consent. *See* U.S. Const. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890). A plaintiff may sue a state official under section 1983 for damages only if she sues the official in his individual capacity, because a suit against a state official in his official capacity is essentially a suit against the state itself. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Here, the Court has already dismissed Yu's individual capacity claims against Abbott, and her official capacity claims against him for damages must be dismissed as well for failure of subject matter jurisdiction.

Abbott contends he is not the official responsible for the enforcement of the statutes Yu challenged and therefore cannot effectuate the prospective injunctive relief she requests. A plaintiff may sue a state official in his official capacity for prospective injunctive relief if the plaintiff has standing to sue and demonstrates the official has a sufficient connection to the enforcement of the challenged statute. *See Ex parte Young*, 209 U.S. 123, 155-57 (1908) ("individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."). The Fifth Circuit recently reiterated *the Ex parte Young* exception to Eleventh Amendment immunity "only applies when the named defendant state officials have some connection with the enforcement of the act and "threaten and are about to commence proceedings' to enforce the unconstitutional act." *Okpalobi v. Foster*,244 F.3d 405, 417 (5th Cir. 2001) (en banc) (quoting Young, 209 U.S. at 155-56) (emphasis in original). In holding the Governor and Attorney General did not have a sufficient connection to the enforcement of the statute at issue in that case, the Fifth Circuit stated, "it is not merely the general duty to see that the laws of the state are implemented that substantiates the required 'connection,' but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Okpalobi*, 244 F.3d at 416. The Fifth Circuit thus instructed

district courts considering the applicability of the *Ex parte Young* exception to examine (1) the statutory or constitutional power of the official to enforce the statute at issue and (2) the demonstrated willingness of the official to use his enforcement power. *Okpalobi*, 244 F.3d at 417.

In this case, the Plaintiff does not identify the statutory or constitutional provision giving Abbott the power to enforce the statutes she challenges, and she does not allege he has demonstrated his willingness to enforce them. In her complaint, she stated the Attorney General is "the state's chief law enforcement officer and has factually initiated the process of enforcement of Texas unconstitutional statutes in plaintiff's case." Complaint at ¶35. However, the only fact she identifies supporting this alleged enforcement are the Attorney General's filing of a motion to abate based on Texas Government Code §81.102 in Yu's state court case against the Texas Department of Transportation, in the course of representing of that state agency. Id. at ¶51. Invoking a statute as authority while defending an agency in a lawsuit is not the same as commencing civil or criminal proceedings against a person and therefore does not qualify as enforcement for purposes of *the Ex parte Young* exception. Yu's complaint does not identify any steps the Attorney General has taken to enforce any of the other statutes she challenges.

The Attorney General contends he does not have the power to enforce the statutes at issue in this case. First, Abbott contends under Texas health and Safety Code §693, which involves the removal of a deceased's cornea and organs by the medical examiner, the Travis County Medical Examiner has the authority to remove body parts and corneas when performing an autopsy within Travis County. The statute gives the medical examiner authority to permit the removal of organs and corneal tissue under certain circumstances. Tex Health & Safety Code §693.002-693.004. The statute does not mention the Attorney General and does not grant the Attorney General authority to oversee the various county medical examiners throughout the state. That oversight is presumbly carried out by the county commissioners' courts. The Plaintiff does not identify any other statute or constitutional provision that grants the Attorney General any enforcement power

over this statute, and therefore has not met her summary judgment burden. Accordingly, the Court holds the Plaintiff has not established the Attorney General has any enforcement connection to Texas Health and Safety Code §693, and the Attorney General is therefore immune from suit under the Eleventh Amendment.

The Attorney General contends it has no enforcement connection to Texas Government Code §§81.101 and 81.102 and texas Penal Code §§38.122 and 38.123, which relate to the unauthorized practice of law by non-lawyers. The only enforcement connection Yu has identify is the Attorney General's invocation of Texas Government Code §81.102 in moving to abate a lawsuit filed by Yu. She has not specified a statutory or constitutional provision granting the Attorney General the authority to enforce the Texas Government Code provisions at issue. The statute creates an unauthorized practice of law committee to keep the State Bar and Supreme Court informed of unauthorized practice of law and to file lawsuits in the name of the committee and take other actions to eliminate the unauthorized practice of law. *See* Tex. Gov't Code §§81.103-81.104. The Committee is appointed by the Supreme Court. *See* Tex. Gov't Code §§81.103. To the extent an entity has the relevant enforcement authority, it is the committee or the Supreme Court, not the Attorney General. *E.g., Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650 (5th Cir, 2002). Additionally, the Attorney General cannot enforce the Texas Penal Code because he has no authority under state statutes or the constitution to initiate criminal prosecutions; instead, the district and county attorney have that power. *See Tex Const. art. IV, §22; Lone Starr Multi Theatres, Inc. v. Texas*, 922 S.W.2d 295, 298 (Tex. App. - Austin, 1996). Accordingly, Yu has not demonstrated a sufficient enforcement connection to the Texas Government Code and Texas Penal Code provisions she challenges, and her claims must be dismissed.

Finally, the Attorney General argues he has no enforcement authority over Texas Local Government Code §86.021, which requires litigants to pay a service fee for service of legal documents by a constable. The challenged provision is within the "Constable" chapter of the Local Government Code and outlines the lowers and duties of elected constables, including

service of civil process. The statute gives the Attorney General no authority over constables or power to enforce the service provision, and the Plaintiff has identified no other statute or constitutional provision that gives him that power. As with the above statutes, the Court finds the Plaintiff has not demonstrated the Attorney General has an enforcement connection to the challenged statute and therefore cannot invoke the *Ex parte Young* e *See* Tex. Gov't Code §§81.103tion to Eleventh Amendment immunity. Accordingly, the Court must dismiss Yu's official capacity claims against Abbott for failure of subject matter jurisdiction.

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion for Summary Judgment [#39] is GRANTED, and the COURT dismisses the Plaintiff's official capacity claims against Attorney General Greg Abbott for failure of subject matter jurisdiction.

SIGNED this the 23rd day of April 2003.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LI YU, Administrator of the Estate of Wei Wu, Deceased

Plaintiff,

"FILED"
Seal

-Vs-

Case No. A02-CA-157-SS

RICK PERRY, in His Official Capacity Only as the Governor of State of Texas; DARLENE BYRNE, Individually and in Her Official Capacity as a Judge of Texas Court; and JOHN CORNYN, individually and in His Official Capacity as Texas Attorney General,

Defendants.

ORDER

BE IT REMEMBERED on the 20th day of May 2002 the Court reviewed the file in the above-styled cause, specifically defendant Byrne's Motion to Dismiss [#2], plaintiff's response [#7], and Byrne's reply [#11]; defendant Cornyn's Partial Motion for Summary Judgment [#6] and plaintiff's response [#12]; defendant Perry's Motion to Dismiss [#10]; and plaintiff's Motion for Default Judgment against the State of Texas [#8]. Having considered the motions and responses, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

Background

The plaintiff, LiYu, a Kansas resident, filed this civil rights lawsuit pursuant to 42 U.S.C. §§1983, 1985, and 1988. She alleges the defendants violated her constitutional rights in connection with two lawsuits she brought in Travis County district court concerning the death of Wei Wu, of whose estate she was appointed administrator. She contends the defendants conspired to violate

and did violate her rights to bring *pro se* lawsuits, protected by the First, Fourth and Fifteenth Amendments to the United States Constitution. Yu seeks declaratory relief that certain state statutes are unconstitutional; injunctive relief preventing the enforcement of such statutes and reinstating her state court cases; and monetary damages.

Defendant Byrne is a Travis County District Judge who presided over certain proceedings in Yu's lawsuit against Wu's medical staff. Yu sues Byrne in her individual and official capacities. Defendant Perry is Governor of the State of Texas, and Yu sues him only in his official capacities as governor. Defendant Cornyn is Attorney General for the State of Texas. Yu sues Cornyn in his individual and official capacities.

In December 2000, Yu filed a medical malpractice and defamation lawsuit on behalf of Wu's estate and his minor survivor in the 261st District Court of Travis County, Case No. GN003531, and another suit on behalf of Wu's estate against the State of Texas Department of Transportation ("TxDOT") and two TXDOT employees in the 345th District Court of Travis County, Case No. GN003532. *See* Byrne's Motion, Ex. A. The state attorney general's office, representing TXDOT, moved to abate Case No. GN003532 because an estate is an entity that cannot proceed *pro se*. *See* Plaintiff's Response to Cornyn's Motion [#12], Ex. A. Judge Byrne, presiding over the case in accordance with the rotating docket, granted the motion. On October 4, 2001, a different district judge dismissed the case.[3] Case No. GN003531 was dismissed on December 12, 2001.

Based on the outcome in the above two lawsuits, Yu contends the state statutes prohibiting the unauthorized practice of law by non-lawyers, Texas Government Code §§81.101 and 81.102, are unconstitutional because they prohibit *pro se* plaintiffs from exercising their right to represent themselves. Complaint, at ¶79-

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[3] As the plaintiff notes, "On October 31, 2001, plaintiff filed an almost identical complaint against the TxDOT defendants with Federal Court after the state court dismissed the case GN003532." Complaint, at ¶72. That case, Case No. A-01-741-SS, is currently pending before this Court.

89. She also contends Texas Penal Code §§38.122 and 38.123, which make it a third-degree felony for a non-lawyer to gain benefit by acting as a lawyer, are unconstitutional. Id at ¶¶ 90-99. Additionally, she argues the process-serving statute, Texas Government Code §86.021 (c) & (d), discriminates against *pro se* litigants. *Id* at ¶¶ 101-107. She also alleges Texas Health and Safety Code §693 allows a medical examiner to take body parts from a deceased without consent, in violation of the Fifth Amendment. *Id* at ¶¶ 109-113. She contends Rule 92 of the Texas Rules of Civil Procedure allows defendants to assert a general denial to plaintiff's allegations, which discriminates against plaintiffs. *Id* at ¶¶ 114-118. Finally, she alleges the State of Texas discriminated against her by extorting money from her, refusing to prosecute a thief who stole from Wu's estate, refusing to take a discrimination case on behalf of a deceased person, and failing to appoint counsel to represent the deceased. *Id* at ¶¶ 120-125.

Judge Byrne moves to dismiss Yu's claims against her on the basis of judicial immunity. Perry moves to dismiss Yu's claims against him and the State of Texas on the basis of Eleventh Amendment immunity. Cornyn moves for partial summary judgment on Yu's claims against him in his individual capacity.

Analysis

I. Byrne's Motion to Dismiss

Judge Byrne moves to dismiss Yu's claims against her in her individual and official capacities on the basis that she is immune from suit. Under the doctrine of judicial immunity, judges are absolutely immune from suit over judicial acts performed in judicial proceedings, even for acts allegedly done with malicious or evil motive. *Antoine v. Byers & Anderson*, 508 U.S. 429 (1993); Mays v. Sudderth, 97 F.3d 107, 110-11 (5th Cir. 1996). All of Yu's allegations concerning Judge Byrne relate to actions she purportedly took while adjudicating Yu's state court lawsuits, in the course of her official capacity as Travis County District Judge. See Complaint, at ¶¶ 11-14.

The only exception to absolute judicial immunity arises when a judge acts in the clear absence of jurisdiction to do so. *City of*

Houston v. Swindall, 960 S.W.2d 413, 417 (Tex. App. – Houston [1st Dist.] 1998, no writ). Yu contents Judge Byrne lacked jurisdiction over Yu's state court lawsuits "other than on a rotating basis," due to the state district courts' rotating docket system. Yu's response [#7], at 2. However, the rotating docket system does not deprive a judge of jurisdiction over a case assigned to her, and Judge Byrne clearly had jurisdiction over the cases when she took the alleged actions. Accordingly, Judge Byrne should be dismissed as a party defendant in this case on the basis of judicial immunity.

II. Perry's Motion to Dismiss

Defendant Perry moves to dismiss Yu's claims against him on the basis of Eleventh Amendment immunity. Yu sues him only in his official capacity as the Governor of Texas, acting on behalf of the State of Texas. Yu moved for default judgment against Perry and the State of Texas on May 1, 2002, alleging Perry did not answer within twenty days of being served a summons and complaint. She presents a return receipt from certified mail indicating the complaint was received by "Doug Bennight, Mail & Messenger Service" on March 22, 2002. However, Perry contends he was never served with the complaint and received notice of the complaint only when Yu filed for default judgment. Perry filed an answer May 2, 2002. Because, as discussed below, the Court does not have subject-matter jurisdiction over Yu's claims against Perry and the State of Texas, the Court cannot enter a default judgment against Perry and the State of Texas. *See, e.g., MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661-62 (5th Cir. 1996)(vacating default judgment and dismissing for failure of subject matter jurisdiction, finding defendants did not waive immunity by failing to answer); *Patray v. Northwest Publ'g, Inc.*, 931 F.Supp. 865, 869 (S.D. Ga. 1996).

Yu sues Perry in his official capacity, acting on behalf of the State of Texas. *See* Complaint, at ¶33. Under the Eleventh Amendment, federal courts lack subject matter jurisdiction over suits by a citizen of a state against the state, absent the state's consent. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890). Because the State of Texas has not consented to this lawsuit, it is immune from suit. Additionally, a plaintiff may sue a state official for damages only if she sues the official in his individual capacity,

because a suit against a state official in his official capacity is essentially a suit against the state itself. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Because Yu sues Perry only in his official capacity, the Court has no subject matter jurisdiction over her claims against him for damages.

A plaintiff may sue a state official in his official capacity for prospective injunctive relief. *Will*, 491 U.S. at 71 n. 10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). In this case, however, Yu fails to state a claim against Perry upon which relief can be granted, because Perry has no enforcement authority over the statutes Yu claims are unconstitutional. To override Eleventh Amendment immunity under the *Ex parte Young* exception in a suit challenging the constitutionality of a state statute, the state officer defendant must "have 'some connection with the enforcement of the act' in question or be 'specially charged with the duty to enforce the statute' and be threatening to exercise that duty." *Okpalobi v. Foster*, 244, F.3d 405,414 (5th Cir. 2001) (*en banc*) (quoting *Ex Parte Young*, 209 U.S. at 157, 158, 28 S.Ct. 441). Yu has not alleged Perry has any connection to the enforcement of the state statutes she challenges, or that he is threatening to exercise his enforcement duty. Therefore, Perry cannot give effect to any injunctive relief the Court may order, and Yu fails to state a claim against him upon which relief can be granted.

III. Cornyn's Motion for Partial Summary Judgment

Yu sues Cornyn, the Attorney General for the State of Texas, in his individual and official capacities. Cornyn moves for summary judgment on Yu's claims against him in his individual capacity on the basis of qualified immunity. Summary judgment may be granted if the moving party demonstrates there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). For purposes of summary judgment, the Court considers the evidence of the plaintiff, as the nonmoving party, as true and draws all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505, 2513 (1986). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient

factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

The qualified immunity doctrine shields state officials from suit in their individual capacity "insofar as [their] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson v. Creighton*, 483 U.S. 635 (1987). Qualified immunity "is designed to shield from civil liability all but the plainly incompetent, or those who violate the law." *Brady v. Fort Bend Cty.*, 58 F.3d 173, 174 (5th Cir. 1995). In the Fifth Circuit, "the test for qualified immunity is quite familiar: (1) whether the plaintiff has alleged a violation of a clearly established constitutional right and (2) if so, whether the defendant's conduct was objectively unreasonable in the light of the clearly established law at the time of the incident." *Domino v. Texas Dep't of Crim. Justice*, 239 F.3d 752, 755 (5th Cir. 2001). If the answer to either question is "no", the defendant is immune from suit.

Cornyn contents he is entitled to qualified immunity because Yu does not allege any action taken by Cornyn personally, but her only claims are against him in his role as the head of the Attorney General's Office. Under 42 U.S.C. §1983, however, a supervisor cannot be held liable for alleged actions of his subordinates under the theory of *respondeat superior*. *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 286 (5th Cir. 2002); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1996) (en banc). Yu challenges the constitutionality of actions of attorneys for the Attorney General's Office in her state court lawsuit against TXDOT and their actions in enforcing unconstitutional state statutes. The evidence unequivocally indicates Cornyn was not personally involved in the TXDOT suit. *See* Cornyn's Motion, Ex. A ("Hill Affidavit"). Yu contents Cornyn was personally involved in the suit because his name appeared on the pleadings. However, his name appeared on the pleadings only in his official capacity as the Attorney General and head of the Attorney General's Office. Yu's response to the summary judgment motion merely confirms

her attempt to hold Cornyn responsible for the actions of his subordinates.[4] Accordingly, Cornyn's motion for partial summary judgment is granted as to Yu's claims against him in his individual capacity.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Motion for Default Judgment against the State of Texas [#8] is DENIED;

IT IS FURTHER ORDERED that Defendant Byrne's Motion to Dismiss [#2] is GRANTED;

IT IS FURTHER ORDERED that Defendant Cornyn's Partial Motion for Summary Judgment [#6] is GRANTED, and Plaintiff shall TAKE NOTHING from Defendant Cornyn in her suit against him in his individual capacity;

IT IS FURTHER ORDERED that Defendant Perry's Motion to Dismiss [#10] is GRANTED;

IT IS FINALLY ORDERED that the only remaining claims in this lawsuit are Plaintiff's claims against Defendant Cornyn in his official capacity.

SIGNED this the 20th day of May 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE

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[4] Additionally, Yu's discussion of Clinton v. Jones, 520 U.S. 681 (1997), in her response to Cornyn's motion indicates her confusion about the difference between official and unofficial acts and suit in official and individual capacity. Bring suit against a public official for his unofficial acts is not the same as suing an official in his individual capacity. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358, 362-63 (1991).